Supreme Court, U.S.
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No. 97-885

In The

Supreme Court of the United States

October Term, 1997

PAUL J. ENGELHART, *et al.*,

Petitioners,

vs.

CONSOLIDATED RAIL CORPORATION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

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I. THE RESPONDENTS' RELIANCE UPON *SPINK v. LOCKHEED CORPORATION* IS MISPLACED.

The respondents contend that this Court's decision in *Spink v. Lockheed Corporation*, 116 S. Ct. 1783 (1996) (hereinafter *Lockheed I*) "disposes of the arguments advanced in the petition" because the amendments creating the SVP and retiree health care benefits did not implicate the fiduciary duty provisions of ERISA. *See* Respondents' Brief in Opposition, pages 4 and 5. This argument is flawed in two respects.

First, the respondents fail to address whether there is a fundamental difference between overfunded contributory and non-contributory pension plans. In an overfunded contributory plan the surplus is attributable to both employer and employee contributions, while a non-contributory plan surplus is funded entirely by employer contributions. The petitioners do not contend that the participants in a non-contributory plan have an interest in the surplus because the participants have, by definition, not contributed to the existence of that surplus. As the Ninth Circuit stated in *Jacobson v. Hughes Aircraft*, 105 F.3d 1288, 1296 (1997):

> In essence, when a plan is funded by both employer and employee contributions, both the employer and the employees are co-settlors of the plan.

This is the basic premise on which this case turns. A discussion of when fiduciary duties attach under ERISA without first addressing this issue is futile.

Secondly, *Lockheed I* is readily distinguishable from this case because the *Lockheed* plan was a non-contributory pension plan, and this Court did not address whether the *Lockheed* early retirement program violated ERISA's anti-inurement provision as applied in that plan context. The Ninth Circuit distinguished *Jacobson* and *Lockheed I* on this basis. *See* 105 F.3d at 1293.

II. THE RESPONDENTS HAVE FAILED TO DISTINGUISH THIS CASE FROM THE DECISION OF THE NINTH CIRCUIT IN *JACOBSON v. HUGHES AIRCRAFT COMPANY.*

According to the respondents, this case is factually distinguishable from the decision in *Jacobson. See* Respondents' Brief in Opposition, pages 8-13. Their attempts to distinguish these cases must fail because the respondents either have misread *Jacobson* or misapprehend the facts of this case.

A. The Ninth Circuit's Holding In Jacobson Does Not Depend Upon The Occurrence Of A Plan Termination.

The respondent assert that the plaintiffs' rights in *Jacobson* under ERISA section 4044, 29 U.S.C. § 1344 were "triggered" by the termination of the *Hughes* Non-Bargaining Retirement Plan, and that the Ninth Circuit's reversal of a Rule 12(B)(6) dismissal turned upon the allegation that such a termination had occurred. See Respondents' Brief in Opposition at page 10. According to the respondents, the absence of a termination of the Supplemental Plan distinguishes the present case from *Jacobson*. However, the respondents have read the *Jacobson* holding too narrowly and have overlooked the Ninth Circuit's statement in footnote 4, 105 F.3d at 1295:

> n4 Even if we were to conclude as a matter of law that no termination has occurred here, we find that plaintiffs could still amend their complaint to allege a different theory of recovery. As the Seventh Circuit recently noted in a case involving an employer's decision to amend a pension plan to use surplus assets to increase the benefits of current employee participants without increasing the pension benefits of retired participants:
>
> A transaction of this kind would reduce the expected value of the benefits. Writing additional promises

> without increasing the assets available to fund those promises increases the risk that at some time in the future — if, perhaps the economy takes a downturn and . . . [the employer] is unable to top up the plan — the trust will be unable to satisfy all of its obligations . . . . [thus] increasing the risk of nonpayment.
>
> *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184, 1187 (7th Cir. 1994). The Supreme Court in *Lockheed* also recognized that "commercial bargains that present a special risk of plan underfunding" are the kind of transactions that ERISA was intended to prohibit. 116 S. Ct. at 1971.

Clearly, the Ninth Circuit did not hold, as the respondents contend, that the allegation or occurrence of a plan termination was a sine qua non to the claims advanced by the petitioners. Instead, the court explicitly stated that contributory plan participants such as the petitioners can challenge plan amendments creating new categories of benefits payable in part from the employee-generated portion of a plan surplus as an impairment of the financial security of the fund from which their benefits are paid. The petitioners specifically alleged this very theory in their complaint. C.A. App. A593, A595, A601.[1] The respondents have simply ignored this aspect of the Ninth Circuit's decision in *Jacobson.*

B. Conrail Has Funded The SVP Benefits And Retiree Health Care Accounts From The Supplemental Plan Surplus For Participants Who Never Contributed To The Existence Of That Surplus.

In *Jacobson* surplus assets of the contributory *Hughes Aircraft* plan to fund a new non-contributory pension plan and a special early retirement plan. *See* 105 F.3d at 1293. In their complaint the

1. We again refer to the appendix below in *Engelhart v. Consolidated Rail Corporation*, No. 96-1920.

Jacobson plaintiffs had alleged "that is so doing, *Hughes* is improperly using plan assets attributable in part to employee contributions for its own benefit." *See* 105 F.3d at 1291. The petitioners have made the same allegations in their complaint. C.A. App. A592-A595, A600. The participants in the *Hughes* non-contributory plan and the early retirement program had never been participants in the contributory plan and therefore had never contributed to the existence of the surplus in that plan. The respondents predictably contend that the amendments funding the SVP and retiree health care accounts were designed to provide additional benefits for Conrail management employees who were already Supplemental Plan participants. This is a superficial distinction which does not withstand a closer historical scrutiny of the Supplemental Plan and its predecessor plans.

Non-agreement, *i.e.* management, Conrail employees have never made contributions to the Supplemental Plan at any time during its existence, nor were any made to the Penn Central Plan during its relatively brief existence.[2] Until February 1, 1965 the Pennsylvania Railroad and its non-agreement employees made matching contributions to the PRR Plan.[3] On February 1, 1965 the PRR notified management employees that their participant contributions were no longer needed to fund the PRR Plan. C.A. App. A587. Most of the Merged Plans also required matching contributions from non-agreement personnel as a precondition to matching contributions from the Merged Railroads. C.A. App. A587. In short, the petitioners represent a large group of former railroad employees who made matching employee contributions to their pension plans during their lengthy railroad careers.[4] Those

2. The Penn Central Plan, like the Supplemental Plan, required contributions from agreement personnel.

3. The PRR Plan had required matching employer and management employee contributions since it was established on June 1, 1938.

4. Rather than examine the history of employee contributions to (Cont'd)

Conrail management employees who participated in the SVP or were provided benefits from the retiree health care accounts have never contributed to the existence of the Supplemental Plan surplus. The petitioners do not begrudge the good fortune of those Conrail employees selected to participate in the SVP and the retiree health care accounts as long as those benefits are funded solely from that portion of the surplus attributable to employer contributions. The petitioners merely contend that Conrail does not have unfettered discretion to use that part of the Supplemental Plan surplus attributable to employee contributions to fund these new benefit categories. This is the fundamental concept upon which the Ninth Circuit concluded that the *Jacobson* plaintiffs had stated viable causes of action under 29 U.S.C. §§ 1103(c)(1) and 1104(a)(1). *See* 105 F.3d at 1294 and 1296.[5]

CONCLUSION

The respondents' attempts to distinguish the Ninth Circuit's holding in *Jacobson* from the decision of the Third Circuit in this case and their reliance on this Court's holding in *Lockheed I* fail. This case presents an issue of global significance under ERISA. Therefore, the petition should be granted.

(Cont'd)

all the relevant plans, the respondents discuss only a nine year period during which only agreement employee contributions were made and after two years of which Conrail's employer contributions ceased.

5. The relevant holdings appear at pages 19 and 21 of the Petition for Writ of Certiorari.

Respectfully submitted,

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